No. 91-946

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: December 9, 1991

QUESTION PRESENTED

Whether the decision of the Court of Appeals—which conflicts with decisions of this Court and of other courts of appeals—was in error in dismissing petitioner's appeal as moot following compliance by a disinterested third party with an IRS summons enforcement order, although effectual relief remained available to the petitioner through return of documents and prohibition on the government's future use of the documents?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
United States of America
Frank S. Zolin

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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Petitioner,

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UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Church of Scientology of California ("the Church") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals dismissing the appeal as moot (1a-2a) is unreported. The March 13, April 15, and May 21, 1991 orders of the district court (3a-11a) are unreported. A prior opinion and order of the Ninth Circuit (13a-15a), reported at 905 F.2d 1344 (9th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1309 (1991), and the unreported order of the Ninth Circuit denying rehearing and a suggestion for rehearing *en banc* (12a), followed the remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989). The

order of the *en banc* court, issued prior to this Court's decision, vacating the order granting rehearing (18a-26a) is reported at 842 F.2d 1135. A subsequent concurrence to that order (16a-17a) is reported at 850 F.2d 610. The earlier order of the *en banc* court granting rehearing (27a) is reported at 832 F.2d 127. The initial opinion of the panel (28a-41a) is reported at 809 F.2d 1411. The April 30, 1985, order of the district court (44a-46a), and the June 10, 1985, order of the district court denying reconsideration (42a-43a) are unreported.

JURISDICTION

The final judgment of the court of appeals was entered on September 10, 1991 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies to which the United States shall be a Party. . . ."

STATEMENT OF THE CASE

1. The MCCS tapes, which are the subject of this litigation, involve two confidential attorney-client conversations held in July 1980 between lawyers and representatives of the Church and of L. Ron Hubbard. The tapes were wrongfully obtained by Gerald Armstrong, a former adherent of the Scientology religion, in the early 1980's. *Zolin*, *supra*, 491 U.S. at 557. The tapes, along with thousands of other documents wrongfully in Armstrong's possession, were eventually ordered placed under seal in the custody of the Los Angeles County Superior Court in *Church of Scientology of California* v. *Armstrong* (No. C420153). *See Zolin*, 491 U.S. at 557. On October 24, 1984, the IRS served the subject summons on the Los Angeles County Clerk, who also serves as the Clerk of the Los Angeles County Superior Court, which summons sought production of numerous exhibits held under seal in the pending *Armstrong* case. *See id.* On November 21, 1984, the County Clerk complied with the IRS summons despite extant sealing orders, and made the tapes available to the IRS, which made copies, reviewed, and took notes of the tapes. *See id.*; E.R. 2-4.[1]

On November 27, 1984, the district court, in *Church of Scientology* v. *Armstrong*, No. CV 84-9003-HLH (C.D.Cal.), ordered the IRS to place the copies of the tapes and any notes made from the tapes in the custody of the district court, because the County Clerk had erroneously and improperly made the sealed tapes available to the IRS (47a-49a); *Zolin*, 491 U.S. at 557-58; E.R. 15-17. The government did not argue at that time that the County Clerk's compliance with the summons made the Church's proceeding for the return of the tapes moot. The IRS complied with the district court's order on or about November 29, 1984 (48a); E.R. 4. The original tapes remained under seal in the custody of the Superior Court, and on January 22, 1985, the district court ordered that the copies and notes also be returned to the Superior Court's custody (47a-49a).

2. On January 18, 1985, the government commenced this proceeding, pursuant to 26 U.S.C. §§ 7402, 7602 and 7604, by filing a petition in the district court to enforce the October 24, 1984, summons served upon the Los Angeles County Clerk (29a); *Zolin*, 491 U.S. at 558; E.R. 1-6. The Church and Mary Sue Hubbard intervened in the district court to oppose enforcement of the summons, on the ground relevant here, that the MCCS tapes are protected by the attorney-client privilege (18a). The government asserted that the crime-fraud exception to the privilege applied to the MCCS tapes.

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1 "E.R." refers to Appellant's Excerpts of Record filed by the Church in the court below.

The key issue throughout this litigation has been whether a seventeen-page partial transcript of the tapes obtained by the IRS could be considered in determining the crime-fraud question, and if so, whether the exception was established. This issue was extensively litigated in the district court (42a-46a), in the court of appeals (16a-41a) and this Court, *Zolin*, 491 U.S. 554.

In establishing standards for determination of the crime-fraud exception, this Court held:

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Zolin, 491 U.S. at 572 (internal quotations and citations omitted). This Court further held that "the threshold showing to obtain *in camera* review may be met by using any relevant evidence, *lawfully obtained*, that has not been adjudicated to be privileged." *Id.* at 575 (emphasis added). This Court noted that whether the partial transcripts in this case were *lawfully obtained* remained an open question. *Id.* at 559 n.5. The Church had attempted to raise the question how the government had obtained the partial transcript (*i.e.*, legally or illegally) in the initial proceedings in the district court. The court, however, precluded the Church from presenting evidence on this issue because it (erroneously) found this issue to be irrelevant, E.R. 26-34, and then ruled in the Church's favor on the merits of the crime-fraud issue *after* reviewing the partial transcript.

3. On remand from this Court, the court below reviewed the partial transcript and held that it "appear[ed] to" establish the crime-fraud exception (15a). The court then stated, "On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time." (15a).[2] In a footnote to this explicit statement that the Church could make further objections on remand, the court below specifically noted that *it* had not reached the issue whether the transcripts were lawfully obtained because "[t]he Church did not raise this issue in its original appeal" (15a n.2). The court below was apparently confused about the procedural posture of the case, as the Church had *prevailed* on the tapes issue in the district court; the *government* had appealed the decision, *not* the Church. In any event, nothing in the court's decision could reasonably be read to preclude the *district court* from resolving an issue that the Church *had* raised, but which the district court had refused to address, erroneously believing it to be irrelevant, and which was, in any event, unnecessary to the district court's original decision.

The Church's petition for rehearing and suggestion for rehearing *en banc* was denied on September 19, 1990 (12a). Its petition for writ of certiorari was denied by this Court on March 18, 1991. *See Church of Scientology of California* v. *United States*, ____ U.S. ____, 111 S.Ct. 1309 (1991).

4. On January 14, 1991, while the Church's petition for a writ of certiorari was *sub judice* in this Court, the government moved, without notice to the Church's attorneys, in the district court for access to the MCCS tapes. E.R. 74, item 58. On January 17, the district court ordered that the tapes in the possession of the Superior Court be made available for inspection and copying by the government. E.R. 40-41. On January 23, 1991, the government obtained an *ex parte* order from the County Superior Court, which ordered the County Clerk to comply with the district court's enforcement order. E.R. 42-43. That same day, the County Clerk made the tapes available to the government, which then made copies of the tapes.

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2 There is in fact no proceeding into which the tapes may be admitted. This is merely a summons enforcement proceeding, in which the IRS has sought access to the tapes, not to admit them into any proceeding.

The Church did not learn of these *ex parte* proceedings until February 1, 1991. The Church then moved for return of the tapes on the grounds that: 1) the district court's April 30, 1985 stay order remained in effect (45a-46a); 2) the government had failed to give the Church notice of its attempt to obtain the tapes on January 14, 1991; and 3) several important issues remained for resolution on remand. On March 13, 1991, the district court agreed with the Church and ordered that any copies of the tapes and any notes or transcripts in the possession of the government be returned to the district court (7a-8a, 11a). Shortly thereafter, the government complied with that order. Again, the government did not argue that the case was moot on the ground that the County Clerk had fully complied with the district court's summons enforcement order.

In the district court, the Church opposed enforcement of the summons on three grounds: (1) the question whether the IRS obtained the partial transcript in a lawful manner remained to be decided, pursuant to the remand of this Court and the court of appeals; (2) testimony in January 1991 of the relevant IRS agents revealed that the investigation of the IRS' Criminal Investigation Division, pursuant to which the summons for the tapes was issued, had been terminated, and that the civil component of the IRS' tax examination of L. Ron Hubbard had been completed, and thus there remained no legitimate investigatory purpose for the summons, *see United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); 26 U.S.C. § 7602(a); and (3) the district court should review the contents of the tapes themselves to assure that their release would not violate the attorney-client privilege, consistent with the procedure urged by the three dissenting judges in the court of appeals' order vacating the court's prior order granting *en banc* review (24a-26a).

In its March 13 and May 21, 1991 orders, the district court refused to consider any of the Church's objections on their merits. Instead, it held that the court of appeals, although concededly not addressing any of these issues directly, had precluded the district court's consideration of them when it

resolved the attorney-client privilege issue (3a-4a, 8a-11a). Following this Court's denial of the Church's petition for a writ of certiorari on March 18, 1991, by order dated April 15, 1991, the district court ordered that the tapes be delivered to the IRS (5a-6a). The district court refused to stay its order pending appeal, but did grant a 21-day stay to permit the Church to seek a stay from the court of appeals (6a).

5. The Church filed a timely notice of appeal and sought a stay of the district court's order in the court of appeals on April 25, 1991. That court denied the Church's stay application on May 6, 1991. On May 8, 1991, Circuit Justice Sandra D. O'Connor denied the Church's application for a stay to this Court.

Following these denials, the Church moved on May 16, 1991, to expedite its appeal, which motion was granted on June 11, 1991. However, on May 21, the district court ordered that the government could obtain the copies of the tapes held by the district court (3a-4a), and on or about May 24 the government obtained those copies. On May 30, 1991, the court below denied the Church's renewed emergency motion for a stay pending appeal, and on May 31, 1991, it denied the Church's second renewed emergency motion for a stay pending appeal.

On May 30, the court below also ordered that the Church show cause why its appeal should not be dismissed as moot on the ground the IRS had acquired the tapes. The Church responded by explaining: 1) an appeal is not moot when the court can award the appellant effective relief, even if not precisely the relief originally sought, which was available here in the form of return of the tapes and prohibition on further disclosure of information obtained from the tapes; 2) several courts, including the Ninth Circuit, had either held or strongly indicated that compliance with an IRS summons by a disinterested third party does not moot an interested party's appeal; 3) a finding of mootness because of compliance with a summons was inconsistent with analogous decisions of the Ninth Circuit, the Supreme Court, and other courts of

appeals; and 4) the issues raised on appeal could not be resolved properly at some speculative future proceeding.[3]

By Order dated September 10, 1991, the court below held, "Because it is undisputed that the tapes have been turned over to the IRS in compliance with the summons enforcement order, no controversy exists presently and this appeal is moot. *See United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990)" (2a). The order contained no further analysis or reasoning. The meritorious issues the Church raised in the district court and on appeal from the district court's order have never been addressed.

REASONS FOR GRANTING THE PETITION

The court below erred in dismissing petitioner's appeal as moot following disinterested third party compliance with an IRS summons enforcement order. First, it is well-settled that an appeal is not moot as long as a live, concrete controversy between adverse parties continues to exist and the court may grant any effectual relief, even if it is not the precise relief requested in the initial proceedings. The decision of the court below conflicts with decisions of this Court and of other courts of appeals that disclosure of documents to the government does not moot an appeal when, as here, relief in the form of return of documents and no further use of the documents remains available.

Second, there is a split in the courts of appeals whether compliance by a disinterested third party with an IRS summons enforcement order renders the appeal of the interested party moot. Such an appeal should not be held moot for several reasons: a live, concrete controversy remains between the

3 Pursuant to the court's expedited briefing schedule, the Church submitted its brief on the merits and excerpts of record on July 9, 1991, while the mootness issue was *sub judice*; the government never submitted its brief on the merits, originally due July 30, 1991, as the court did not rule on the government's request for an extension of time until it ruled on the mootness issue (2a).

interested parties, because erroneous IRS access to taxpayer documents may result in a variety of harms to the taxpayer; effective relief is available if the appellate courts determine that the district court order is erroneous; the right to appeal should not turn on the fortuity of the location of the documents; and the denial of the right to appeal an erroneous district court order undermines the taxpayer's protections created by Congress in summons enforcement proceedings. *See* 26 U.S.C. § 7609.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF COURTS OF APPEALS THAT AN APPEAL IS NOT MOOT WHEN EFFECTIVE RELIEF IS AVAILABLE

As this Court has recently reiterated, "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 1253 (1990). " 'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)); *see also DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (case is moot when "[t]he controversy between the parties has . . . ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests' ") (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937)); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984) ("As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot. . . ."). "The burden of demonstrating mootness 'is a heavy one.' " *Davis*, 440 U.S. at 631 (quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

Here, the controversy between the Church and the government over access to and use of the tapes remains "definite and concrete," and the parties clearly retain "adverse legal interests" on this issue. The government failed to meet its heavy burden of demonstrating mootness, and nothing in the

opinion below explains why there is no longer a "live" controversy between the parties.

In determining whether interim events have rendered an appeal moot, the federal courts do not limit their consideration to whether the precise relief originally sought is still available, but rather they determine whether an event has occurred "which renders it *impossible* for this court . . . to grant [a party] *any effectual relief whatever*." *Mills* v. *Green*, 159 U.S. 651, 653 (1895) (emphasis added). Although *Mills* is not of recent vintage, the courts of appeals continue to cite *Mills* for the principle that a case is not moot when there remains available "*any* effectual relief." *See, e.g., In re Stadium Management Corp.*, 895 F.2d 845, 848 (1st Cir. 1990); *Central States Pension Fund* v. *Central Transport, Inc.*, 841 F.2d 92, 95-96 (4th Cir. 1988); *Garcia* v. *Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986); *Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103, 1108 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1226 (6th Cir. 1985). As one commentary has stated, "decision should not be denied if a worthwhile remedy can be given"; *i.e.*, a case is not moot when the court has the "ability to undo the effects of conduct that was not prevented by the time of decision." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3533.3, at 278-79 & n.36 (2d ed. 1984) (citing cases).

This well-settled doctrine that mootness does not turn on the availability of the precise relief originally requested is reflected in Fed. R. Civ. P. 54(c), which provides in pertinent part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief* in his pleadings" (emphasis added). As one court has stated in rejecting an argument that a case was moot because the requested relief was no longer available, "The rule [54(c)] requires that a court ascertain whether the plaintiffs are entitled to *any* remedy, not whether they have asked for the proper remedy." *Kirby* v. *United States Government*, 745 F.2d 204, 207 (3d Cir. 1984) (emphasis original).

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court applied the doctrine of the availability of any effectual relief in a situation remarkably similar to the instant controversy. In *Sells Engineering*, the respondents had sought to prevent the disclosure of grand jury materials to Justice Department Civil Division attorneys. After the district court and the court of appeals refused to stay disclosure,

> the Civil Division attorneys and their assistants *enjoyed access to the grand jury materials for more than two years* while this case was pending in the Court of Appeals. . . . The Government argued in the Court of Appeals that the case was moot because *the disclosure* sought to be prevented *had already occurred*.

Id. at 422 n.6 (emphasis added). Despite the disclosure, this Court held:

> The Court of Appeals correctly rejected the contention:
>
> "The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant *partial relief by preventing further disclosure*." *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d, at 1187-1188.

463 U.S. at 422-23 n.6 (emphasis added).

Applying the principles of *Sells Engineering* and *Mills* here, it is clear that this case is not moot, "[s]ince effective relief may still be available if [the court of appeals] conclude[s] the district court's order was issued in error." *Pyramid Lake Paiute Tribe* v. *Hodel*, 882 F.2d 364, 369 (9th Cir. 1989). As in *Sells Engineering*, the court below may order that the tapes and any documents derived from the tapes be returned to the custody and control of the district court and that any infor-

mation derived therefrom not be further disclosed to any persons or otherwise used by the IRS, which would effectively return the parties to the *status quo ante*. While such relief is not "the precise relief sought" in the district court, *Pyramid Lake*, 882 F.2d at 368, it certainly is "effectual relief," *Mills*, 159 U.S. at 653, and "partial relief," *Sells Engineering*, 463 U.S. at 423 n.6, to which the Church, should it prevail on the merits, would be entitled. *Id.*

Indeed, *twice* previously in this case, the IRS has obtained access to the tapes following erroneous court orders, and both times the district court ordered the tapes and any notes or copies of the tapes returned to the custody and control of the district court (8a, 47a-49a). At no time did the government or the lower courts suggest that this court-authorized IRS access made the case moot or that return of the tapes did not constitute "effectual relief" merely because one could hypothesize various ways in which the *status quo ante* was not precisely restored. There is no principled reason why such relief, effective twice previously in this very case, would not constitute effectual relief now.

In addition to *Sells Engineering*, the lower courts have frequently held that when the government may have erroneously obtained documents through its subpoena power, the availability of the "effectual relief" of return of documents or of preventing further disclosures of documents to government officials prevents an appeal from being moot. *See, e.g., FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978) (appeal of order enforcing FTC subpoena *duces tecum* not moot despite compliance; "[i]f this case were decided in Gibson's favor, relief would be available by an order requiring the FTC to return the subpoenaed documents and to forbid use of the material in the adjudicatory hearing"); *FTC* v. *Browning*, 435 F.2d 96, 97 n.1 (D.C. Cir. 1970) (same); *Casey* v. *FTC*, 578 F.2d 793, 796 (9th Cir. 1978) (despite full compliance with FTC subpoena *duces tecum*, "[t]he possibility that we may yet afford the Union relief by preventing further disclosure or by requiring the FTC to return records wrongfully subpoenaed vests the

appeal with controversy sufficient to render the case justiciable"). There is, petitioner submits, no principled basis upon which to distinguish compliance with an FTC subpoena from compliance with an IRS summons enforcement order for purposes of a determination of mootness.

Similarly, in *In re Grand Jury Subpoena Dated June 5, 1985* (*Doe*), 825 F.2d 231 (9th Cir. 1987), attorney Doe, in response to a subpoena *duces tecum*, turned attorney-client documents over to the court for its review. The court then delivered the documents to the government, which presented them to the grand jury, which indicted the client Roe, but not Doe. The Ninth Circuit, relying on both its decision and this Court's decision in *Sells Engineering*, *supra*, held:

> The grand jury has not indicted Doe; the continued possession and control of the documents by the grand jury places Doe at risk of being indicted. *Cf. Sells*, 642 F.2d at 1187-88. . . . we can diminish this risk *by ordering the return of all of the documents. Sells*, 463 U.S. at 422 n.6 . . . . Under our reasoning in *Sells*, Doe's appeal is not moot.

825 F.2d at 235. The court in *Doe* distinguished Roe's appeal, holding that Roe's appeal was moot because Roe "has been indicted; we cannot unring that bell." *Id.* at 234 (internal quotations omitted).

Here, of course, no potential taxpayer targets of the IRS have been indicted or even have had civil proceedings initiated against them. They are in precisely the same position as Doe, who was permitted to pursue his appeal in the court of appeals even after the government had obtained and made use of the documents. *See also United States* v. *Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n.2 (9th Cir. 1985) (disclosure of grand jury transcripts to civil litigants "does not render this appeal moot . . . because of harm caused by continuing disclosure") (citing *Sells Engineering*, 463 U.S. at 422 n.6)); *Cardwell* v. *Kurtz*, 765 F.2d 776, 779 (9th Cir. 1985) ("the district court's inability to effect complete relief . . . would not justify a refusal to grant as much relief as

possible—ordering the government to divest itself of the embodiment of the illegally seized information").[4]

II. THERE IS A DIRECT CONFLICT IN THE CIRCUITS WHETHER DISINTERESTED THIRD PARTY COMPLIANCE WITH AN IRS SUMMONS ENFORCEMENT ORDER RENDERS AN APPEAL MOOT

The decision of the court below also conflicts with decisions of the Third Circuit on the precise narrow issue presented here—whether compliance with an IRS summons enforcement order by a disinterested third party renders an appeal by the interested party moot.[5] In *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985), the Third Circuit held that full compliance with a summons enforcement order by the Franklin State Bank did not moot the appeal by the Glucks, the intervening taxpayers. The court reasoned that "the surrendering of the documents [by the Bank] to the IRS does not end the controversy *between the parties* because, if we find that the summonses were illegal, we can still fashion a remedy—prohibition of the use of the summoned documents—to afford the Glucks effective relief." *Id.* at 754

4 Under the statutory scheme created for IRS summons enforcement proceedings, there is no separate proceeding that the taxpayer can bring for return of documents. Thus, the live controversy here—whether the IRS has a right to possession and use of the MCCS tapes—cannot be litigated in any other forum and the government's argument that the precise relief sought by the Church here—return of the tapes—was not part of the *government's* enforcement proceeding to obtain the tapes rings especially hollow. Even assuming a separate proceeding were available, to require the Church to initiate such a separate proceeding and to relitigate the issues in the courts below would be a senseless waste of judicial resources.

5 The IRS summons in this case was directed against an indisputably disinterested third party—the Los Angeles County Clerk—not the taxpayer, L. Ron Hubbard, or an interested party such as petitioner herein. The County Clerk's disinterest in this proceeding is demonstrated by his failure to appear or to challenge the summons in any of the proceedings over the last six years in this Court, in the court below, or on remand to the district court.

(emphasis added); *see also United States* v. *Friedman*, 532 F.2d 928, 931 (3d Cir. 1976) (compliance by third parties with summons enforcement order does not moot taxpayer-intervenor's appeal); *United States* v. *Waltman*, 525 F.2d 371, 373 n.1 (3d Cir. 1975) ("Because a stay was denied, the diary was produced. However, the case is not moot since if the diary is not a corporate record, the individual respondent is entitled to its return and appropriate suppression of the use of its contents").

The court in *Gluck* noted that its "holding perpetuates the conflict between this court and most other courts of appeals that have considered the issue." *Id.* at 754 n.3 (citing cases). As that court recognized, however,

> It appears that some of these courts would nevertheless hold that this case is not moot given that compliance with the summons was carried out by someone other than the appellant, i.e., the bank. These courts distinguish between cases in which the summons is issued to the taxpayer/appellant and those in which it is issued to a third party where the taxpayer has intervened. They reason that it is unreasonable to expect *a disinterested third party* to resist a summons and risk contempt of court in order to keep a controversy live; thus they hold that *compliance by the third party does not moot the appeal.*

Id. (emphasis added).

In *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980), for example, the summoned third party, a large accounting firm, had a strong financial incentive to resist the summons.[6] The First

6 The First Circuit stated that, "although Andersen is not the immediate target of the IRS investigation, it has asserted strenuously that it is damaged by the disclosure of these work papers to the IRS. . . . This asserted interest provides sufficient incentive for Andersen to take all available steps to avoid disclosure." *Arthur Andersen*, 623 F.2d at 724.

Circuit held that in such circumstances, the *interested* third party must refuse disclosure and risk a contempt citation to preserve for appeal the issue of the validity of the underlying enforcement order. *Id.* at 724. The court, however, explicitly distinguished this situation from that of a *disinterested* third party: "It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" in order to preserve the issues for appeal. *Id.* at 723-24.

Similarly, in *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), the court held that *taxpayer* compliance with an IRS summons moots the taxpayer's appeal. *Id.* at 534. The court, however, explicitly distinguished that case from *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1978), in which an appeal of a denial of a motion to quash grand jury subpoenas *duces tecum* was held not moot because compliance had been by *disinterested* third parties. *Kis*, 658 F.2d at 534. As the court in *Kis* stated in distinguishing its prior decision, "the subpoenas were directed at members of the staff of appellant . . . , not to [appellant] himself. It would have been unreasonable to require those staff members, who had *no personal interest in resisting* the subpoenas, to expose themselves to contempt by refusing to comply." *Id.* (emphasis added); *see also United States* v. *Barrett*, 837 F.2d 1341, 1346 (5th Cir. 1988) ("once an individual complies with a summons enforcement order, *that person* is precluded from appealing any issues that attack the validity of the district court's decision to enforce the summons") (emphasis added), *cert. denied*, 492 U.S. 926 (1989).

Indeed, the court below recently stated its view that compliance with an IRS summons by a *disinterested* third party does not moot an appeal by an interested intervenor. In *Kersting*, *supra*, the IRS issued a summons to Kersting, who promoted tax shelters, in order to identify taxpayers participating in his investment. 891 F.2d at 1408-09. The taxpayers intervened in the proceedings. *Id.* at 1410. Kersting vigorously contested the summons, and was held in contempt for

refusing to comply with the district court's enforcement order. *Id.* at 1409-10. On appeal, the court below was unable to determine if Kersting had ultimately complied with the summons enforcement order, but, in dictum, it stated that "[i]f he has so complied, his appeal of that order is moot." *Id.* at 1410.

The court of appeals also found that compliance by Kersting would moot the intervening taxpayers' appeal because Kersting was an *interested* third party with a clear and strong economic motive to resist the summons. *Id.* at 1411 & n.9 (citing *Arthur Andersen*, *supra*). The court recognized that *Arthur Andersen* "holds that whereas it is unreasonable to expect a *disinterested* third party to resist a summons at the risk of being held in contempt in order to protect the interests of those taxpayers whom the records concern, no such conclusion applies to interested third parties." *Kersting*, 891 F.2d at 1411 n.9 (emphasis original). Inexplicably, in dismissing the instant appeal as moot, the court below cited to *Kersting* without any discussion or analysis of *Kersting*'s explicit recognition that *disinterested* third party compliance should not render an interested intervenor's appeal moot (2a). Nor did the decision below contain any other analysis or reasoning to explain why this appeal should be considered moot.

Here, of course, the interested intervening party—the Church—has had absolutely no control over the materials at issue or the County Clerk's decision to comply with the summons. Indeed, neither the Church nor Mr. Hubbard placed the documents in the summoned party's possession, unlike most third party cases, in which the summons is directed at banks, attorneys, or accountants to whom the taxpayer voluntarily provided documents and financial information that the IRS subsequently sought. These are documents that never would have been in the Clerk's possession in the first place but for their conversion by Mr. Armstrong.

Unlike in *Kersting*, *Arthur Andersen* or *Kis*, the Church, as the interested party, is wholly without any power to prevent

compliance or to risk a civil contempt citation to preserve the enforcement issue for appeal. As those courts have recognized, it is patently unfair and unreasonable to hold that an otherwise live and concrete controversy between the parties is mooted by the actions of a disinterested party with no stake in the outcome. Because the Church, after extensive but ultimately unsuccessful efforts to obtain a stay in the district court, the court of appeals, and this Court (and after a successful motion to expedite the appeal), was unable to prevent compliance by the disinterested County Clerk with the summons enforcement order, the Church's appeal should not have been dismissed as moot. There is simply no logic to a rule of mootness and, hence, a taxpayer's right of appeal, that turns on the fortuity of the location of the summoned material.

Beyond the concerns of reasonableness and fairness identified in such cases as *Kersting*, *Kis*, and *Arthur Andersen*—which have special force here where the documents at issue were wrongfully obtained by Mr. Armstrong in the first instance—the distinction recognized in these cases between interested party and disinterested third party compliance is consistent with fundamental principles of mootness doctrine. Thus, when an interested party complies with a subpoena or summons, rather than risking contempt, the party demonstrates a lack of concern for the outcome of the enforcement proceeding and, in effect, concedes the absence of a "live" controversy and the definite and concrete adverse legal interests between the parties necessary for federal court jurisdiction. *See*, *e.g.*, *Davis*, *supra*, 440 U.S. at 631; *DeFunis*, *supra*, 416 U.S. at 317; *cf. Sibron* v. *New York*, 392 U.S. 40, 57 (1968) (holding appeal not moot; there has been no "suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation"). As the court in *Kis* explained, when a party has voluntarily chosen "to comply rather than risk a contempt citation . . . they cannot complain of the consequences now." 658 F.2d at 534. When a party does not have that option, however, and a definite and

concrete live controversy remains, as here, then an appeal is not moot.

Although a minority view, *Gluck* is clearly correct that a controversy remains between the *interested* party and the IRS and *effective* relief remains available even after the IRS obtains the summoned documents from a disinterested third party. Continuing access to and use of information to which the IRS has no right is indisputably a continuing harm. These harms include disclosure of the information to other government personnel, including to other government agencies; intrusive investigations based on the information obtained; and the increased risk of indictment and the need to defend in proceedings brought by the IRS based upon the information obtained. *See*, *e.g.*, *Sells Engineering*, 463 U.S. at 422 n.6; *Doe*, *supra*, 825 F.2d at 235; *Gluck*, 771 F.2d at 753-54.

Indeed, in *Sells Engineering*, this Court explicitly rejected the precise argument made by the government here that these continuing harms are not sufficient to keep a controversy alive:

> Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure.

463 U.S. at 422 n.6.[7]

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7 The government's argument below—which directly contravenes this Court's holding in *Sells Engineering*—that such relief is ineffective after disclosure because the "cat is already out of the bag" is particularly specious in the context of this case. As noted, *supra*, the government has had access to the tapes on two earlier occasions and neither the government nor the courts ever suggested that this prior access rendered this case moot. Even if there might be cases in which the disclosure itself causes irreversible, irremediable harm, *see Gluck*, 771 F.2d at 754 (discussing *Vesco* v. *SEC*, 462 F.2d 1350, 1351 (3d Cir. 1972), in which the very act of surrendering documents gave rise to the alleged harm—criminal liability under Swiss bank secrecy law—which the federal courts had no power to cure), this is indisputably not such a case.

Those few courts that do purport to provide a rationale for finding that compliance by a disinterested third party with an IRS summons enforcement order moots an appeal rely on the possibility that the taxpayer might have an opportunity to challenge the admissibility of the summoned information at some hypothetical future proceeding brought by the IRS. *See, e.g., United States* v. *First American Bank*, 649 F.2d 288, 289 (5th Cir. 1981); *United States* v. *Trails End Motel, Inc.*, 657 F.2d 1169, 1170 (10th Cir. 1981); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989).

The unspoken—and incorrect—assumption of these cases is that if the IRS ultimately does not commence criminal or civil tax proceedings, then no harm to the taxpayer is done. A necessary corollary of this assumption is that the taxpayer suffers no harm when the IRS has improper or unlawful access to the citizen's private papers; when it discloses them to other individuals; when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer; and when it brings a criminal or civil tax proceeding dependent on improperly obtained and ultimately suppressed documents.

Yet, in *Sells Engineering*, this Court rejected similar arguments, and made clear that the government's continuing use, possession, and disclosure of wrongfully obtained documents was itself a serious ongoing harm that constituted a live controversy over which the federal courts retained jurisdiction to fashion an appropriate remedy. As the court of appeals stated in *Sells Engineering*, "This action is a proper means to prevent future disclosure before it occurs; the availability of a motion to suppress in future civil proceedings" does not foreclose the Court's immediate consideration of the issues. *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981), *aff'd*, 463 U.S. 418, 422 n.6 (1983); *see also Gluck*, 771 F.2d at 753-54.

The courts that have rejected the Third Circuit's reasoning are simply incorrect in concluding that in resolving the substantive questions raised by the Church, the court below

would " 'give an advisory opinion as to the admissibility in evidence of the records or their product in the event of a subsequent criminal trial.' " *Barrett*, *supra*, 837 F.2d at 1346 (quoting *Lawhon* v. *United States*, 390 F.2d 663, 663 (5th Cir. 1968)). Rather, the court would be resolving a definite and concrete live controversy between adverse parties, which, if resolved in favor of the Church, could be remedied through return of the documents and a prohibition on any future disclosures or use of the information obtained. *See Sells Engineering*, 463 U.S. at 422 n.6; *Gluck*, 771 F.2d at 753-54. Congress, in enacting 26 U.S.C. § 7609, clearly determined that taxpayers must have the ability to prevent erroneous IRS access to documents held by disinterested third parties. It simply belies logic and common sense to conclude that those concerns dissipate at the moment of third party compliance with an *erroneous* district court order, so as to deprive the taxpayer of his right to appeal.

It is important to note that this Court has long recognized the need to construe jurisdictional requirements flexibly to preserve the rights of interested parties when the government seeks documents from disinterested third parties. In *Perlman* v. *United States*, 247 U.S. 7 (1918), for example, this Court relaxed the jurisdictional finality rule for appeals to permit the appellant, who otherwise "was powerless to avert the mischief of the order," *id.* at 13, to raise a claim of privilege in response to an order directed to a third party requesting certain documents. "The Court [in *Perlman*] held an order compelling production was appealable because *it was unlikely that the third party would risk a contempt citation* in order to allow immediate review of the appellant's claim of privilege." *United States* v. *Nixon*, 418 U.S. 683, 691 (1974) (emphasis added) (citing *Perlman*, 247 U.S. at 12-13); *see United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *In re Grand Jury Subpoena*, 926 F.2d 1423, 1430 n.4 (5th Cir. 1991); *Kis*, *supra*, 658 F.2d at 534; *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 201-02 (5th Cir. 1981) (citing cases). The identical considerations apply here to prevent the Church's appeal from being dismissed as moot.

Similarly, Congress expressly provided an interested party with the right to notice and to intervene to prevent disinterested third party compliance with an IRS summons prior to judicial resolution. *See* 26 U.S.C. § 7609(a),(b). Nothing in the statute evinces a congressional intent to limit such judicial review solely to the district court, whether its order is erroneous or not. Indeed, 26 U.S.C. § 7609(h)(1) expressly provides that "[a]n order denying the [taxpayer's] petition [to quash a summons] shall be deemed a final order which may be appealed." The consistent practice of the district courts and the courts of appeals, however, has been to deny stays following the issuance of a summons enforcement order to disinterested third parties, as occurred below. The effect of such denials, when combined with holding the interested party's appeal moot following third party compliance, is not only to deny consideration of a potentially meritorious appeal, but to undermine the rationale of *Perlman* and to render the procedural protections created by Congress in 26 U.S.C. § 7609 a nullity for any taxpayer who does not prevail initially in the district court.

Finally, the Church emphasizes that permitting its meritorious appeal to go forward will not interfere with the IRS' tax collection functions. The IRS has the tapes and can use them as it sees fit unless and until the court of appeals orders otherwise. If the district court order is determined to be erroneous, certainly there is no conceivable injustice in requiring that the IRS make no further use of the tapes. By contrast, both congressionally authorized taxpayer intervention, pursuant to 26 U.S.C. § 7609, and the court-approved practice in which the interested party preserves his right to appeal by refusing to comply with an enforcement order and then submitting to a contempt proceeding, substantially delay IRS access to summoned documents, and thus have far greater impact on the IRS' pursuit of tax revenues than permitting an appeal following disinterested third party compliance with a summons enforcement order.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 9, 1991

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55506
D.C. No. CV-85-0440-HLH
(Central California)
Sept. 10, 1991

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

FRANK ZOLIN,

Respondent,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Intervenor-Appellant.

Before:

SNEED, SCHROEDER, and CANBY,

Circuit Judges.

ORDER

On May 30, 1991, this court issued an order to show cause why this appeal should not be dismissed as moot because the tapes that are the subject of this appeal had already been released to the Internal Revenue Service (IRS). Appellant

filed a response to the order to show cause, appellee filed an opposition to appellant's response, and appellant then filed a reply.

Because it is undisputed that the tapes have been turned over to the IRS in compliance with the summons enforcement order, no controversy exists presently and this appeal is moot. *See United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990). Accordingly, this appeal is dismissed.

Appellee's June 24, 1991 "Objection to Order to Expedite Appeal and Motion to Stay Briefing Schedule" and its July 23, 1991 alternative renewed motion for a stay of the briefing schedule or for an extension of time to file its answering brief are denied as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN; CHURCH OF SCIENTOLOGY,

Intervenor.

CIVIL MINUTES—GENERAL

Date May 21, 1991

PRESENT: HON. HARRY L. HUPP, *Judge*

PROCEEDINGS: Order Regarding Delivery of MCCS Tapes

ORDER

The court has considered Intervenor's objections to the Ex Parte Application for delivery of the MCCS tapes.

Intervenor requests that the court listen to the tapes and make its own findings as to whether the crime-fraud exception to the attorney client privilege applies. Since the Court

of Appeals has decided this question adversely to Intervenor, there is no point in this court doing an idle act.

Intervenor also requests that the same paragraph regarding non-delivery of the tapes to other government agencies (unless the matter is referred for criminal proceedings, now apparently a moot question) be included in this order as was contained in the original order and affirmed by the Court of Appeals. This paragraph was originally requested because Intervenor was concerned that material obtained by the special processes of the IRS would find its way [into] civil litigation with the government not involving taxes. A similar order appears appropriate here; thus Intervenor's form of order (deleting the last sentence as beyond the purpose of the order) is signed and filed this date.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK S. ZOLIN

CIVIL MINUTES—GENERAL

Date April 15, 1991

PRESENT: HON. HARRY L. HUPP, *Judge*

ATTORNEYS PRESENT FOR PETITIONER:
EDWARD M. ROBBINS

ATTORNEYS PRESENT FOR INTERVENOR:
JOHN J. QUINN
ERIC M. LIEBERMAN

PROCEEDINGS: Petitioner's Motion for Return of the MCCS Tapes

ORDER

The government's motion for an order requiring the MCCS tapes, now in the possession of the clerk of this court, to be delivered to the IRS, is granted. This order is stayed for 21 days to allow the intervenor to seek from the Court of Appeals a stay pending appeal. This minute order is the court's final order on the subject; no more formal order is required.

The intervenor cannot win in this court a case which it lost in the Supreme Court and the Court of Appeals.

The court declines to reconsider its minute order of 3/13/91, which it considers to be correct.

Under the minute order of 3/13/91, upon denial of certiorari (as occurred on 3/18/91), all conditions for delivery of the tapes to the government were satisfied. The court is not inclined to reconsider its previous rulings in the matter. Litigation must end sometime, although one would not learn that lesson from this case.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN

CIVIL MINUTES—GENERAL

Date March 13, 1991

PRESENT: HON. HARRY L. HUPP, *Judge*

ATTORNEYS PRESENT FOR PETITIONER:
EDWARD M. ROBBINS

ATTORNEYS PRESENT FOR INTERVENOR:
JOHN J. QUINN
EARL C. COOLEY

PROCEEDINGS: MOTION TO VACATE MINUTE ORDER

ORDER

The application of Intervenor Church of Scientology to vacate this court's order of 1/17/91 and to reinstate the stay order of 4/30/85 is granted in part as set forth below. The MCCS tapes are to be delivered to the clerk of this court and kept sealed until further order of this court. The court expects to order deliver of the material to the IRS on the conditions set forth below.

At the time the order of 1/17/91 was made, the court believed that the Church had been notified of the application and was unaware that certiorari had been applied for following the most recent decision of the Court of Appeals. The order would not have been entered at all had the court known that notice had not been given the Church. The court would have asked counsel's views on whether the stay should be continued in effect pending ruling on certiorari. The court finds that the Church did not receive notice by reason of the negligence of plaintiff in failing to see that proper notice was given (i.e., failing to note that one attorney had died and another had given notice of change of address years before).

In view of the decision of the Court of Appeals, which the court believes is at least ambiguous in certain respects (i.e., the direction to receive the tapes in evidence may evidence a misunderstanding of what this case was about), the court believes that the previous stay of delivery of the MCCS tapes should remain in effect until the Petition for Certiorari is ruled upon (and to decision by the Supreme Court, if granted).

The court finds the other argument by the Church—that the issue of the illegality of the acquisition of the partial transcripts is still alive—to be without merit, or, at any rate, not open to determination by this court. The effect of the holding of the Court of Appeals must be analyzed. The Court of Appeals determined (as a matter that is at least partially factual) that the Church was not entitled to the privilege because the crime-fraud exception applied. In doing so, the Court of Appeals apparently erroneously assumed that this determination was necessary to decide whether the tapes were admissible in some proceeding. It reserved to this court all other objections. The Court of Appeals apparently never realized that it was deciding the only relevant question, and that no other valid objections exist once that question was decided. This is because determination of the illegality question was a preliminary step before the transcripts could be analyzed to determine if the crime-fraud exception applied. When the Court of Appeals decided that the crime-fraud exception to the privilege applies, the preliminary determinations to the making of that determination have already been decided (or erroneously not decided, but that is not for this court to say). The consequences of the method of attack on the problem laid down by the Supreme Court must be recognized. Illegality of the method of obtaining the partial transcripts is a preliminary question to the next step in the procedure—deciding whether the court may make an in camera inspection of the allegedly privileged materials. Since that (and other) preliminary questions are subsumed by the decision on the ultimate issue (i.e., whether the crime-fraud exception applies), the decision of the Court of Appeals that the exception applies leaves this court nothing to do by way of making preliminary determinations to the decision of the ultimate question. Thus, it is not open to this court on the present state of the record as left by the Court of Appeals to make any determinations that are preliminary to the decision of the question of whether the crime-fraud exception applies.

It does seem possible that the Court of Appeals was under some misunderstanding of the issues. The mandate to receive the tapes into evidence "subject to any objections the parties might make at that time" seems to assume that there are questions pending other than whether the crime-fraud exception obviates application of the attorney-client privilege. There are not. All other issues have long since been determined. If there is no privilege by reason of the crime-fraud exception, the summons must be enforced and the tapes delivered to the IRS. The Church apparently argues that the question of illegality of the method of obtaining the partial transcripts is a question separate and apart from the question

of the applicability of the crime-fraud exception. It is not. It is merely a preliminary question to whether the court should go into an in camera review of the allegedly privileged material to determine whether the crime-fraud exception applies. Once the determination is made that the crime-fraud exception applies (and whatever other misunderstanding the Court of Appeals may have had, there is no question that it intended to determine that), then all preliminary questions are subsumed. It also seems possible from another clue that the Court of Appeals mistook the place of the illegality issue. It noted that it had not reached that issue because it had not been raised on that appeal. The reason it was not raised is apparent; this court did not decide it, holding that it could not look at the transcripts themselves. Thus, the issue was never presented to the court and the only reason it was briefed to this court at all was for the court to determine that the partial transcripts were not obtained in violation of this court's orders (which was determined). The question of the method of obtaining the partial transcripts did not become otherwise relevant until the Supreme Court made it so as a matter for determination as to whether the court could read the allegedly privileged material. The Court of Appeals subsumed this issue when it read and made determinations from the transcripts.

If the Court of Appeals is deciding any part of the issue (i.e., if the partial transcripts could be considered, what the effect is) but *not* whether the transcripts may be read, then they certainly did not say so. Absent that, there is nothing for this court to do before ordering the transcripts delivered to the IRS than await the Supreme Court's decision on certiorari.

The problem has been raised with this court by the intervenors that this entire proceeding is moot because L. Ron Hubbard has died, thereby foreclosing the possibility of any further investigation of Hubbard's potential criminal tax liability. While it is true that there can be no further investigation of any criminal tax liability, it does not follow that the government has absolutely no use for the MCCS tapes. The reason for this is because the tax investigation of Hubbard

entails civil elements which have survived his death. (*See Author Services* 9Cir'86 804 F.2d 1520, 1522 n.1; *Zolin* 9Cir'87 809 F.2d 1411; *Zolin* '89 105 L.Ed.2d 469, 481 n.3) This proceeding, then, is not moot.

The court understands from the parties that all copies of the tapes, and any notes or transcripts therefore, have been delivered to the U.S. Attorney. They are now to be delivered to the clerk of the court and sealed. Counsel for the Church to prepare form of order, seek approval as to form from the plaintiff, and lodge the same with this court. This minute order contains the court's factual determinations and reasoning, which need not be repeated in the order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105
D.C. No. CV85-440-HLH
(Central California)

Sept. 19, 1990

UNITED STATES OF AMERICA,
Petitioner/Appellee/Cross-Appellant,

v.

FRANK S. ZOLIN,
Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,
Intervenors/Appellants/Cross-Appellees.

Before:

GOODWIN, Chief Judge, BROWNING,
and FARRIS, Circuit Judges.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

June 20, 1990

UNITED STATES OF AMERICA,
Petitioner/Appellee/Cross-Appellant,

v.

FRANK S. ZOLIN,
Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,
Intervenors/Appellants/Cross-Appellees.

On Remand from the United States Supreme Court.

Before:

GOODWIN, Chief Judge,
BROWNING, and FARRIS, Circuit Judges.

FARRIS, *Circuit Judge*:

The facts of this case are set forth in our previous opinion, *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part and vacated in part*, ____ U.S. ____, 109 S.Ct. 2619,

105 L.Ed.2d 469 (1989). We now resolve whether tapes of two meetings of the Mission Corporate Category Sortout project are admissible under the crime-fraud exception to the attorney-client privilege in light of the Supreme Court's ruling in *United States v. Zolin*, ____ U.S. ____, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). We hold that the tapes are admissible.

"To invoke the [crime-fraud] exception successfully the party seeking disclosure . . . must make out a prima facie case that the attorney was retained in order to promote intended or continuing criminal or fraudulent activity." *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353, 1354 (9th Cir. 1977). The Government has presented the following evidence of intended illegality: (1) Agent Petersell's Supplemental Declaration of March 8, 1985, (2) Petersell's Supplemental Declaration of March 15, 1985, and (3) partial transcripts of the tapes themselves.[1]

In our first *Zolin* opinion we examined only the independent evidence presented—items one and two above—and held that "while not altogether insubstantial, [this evidence] is not sufficient to make out the requisite prima facie showing of intended illegality." 809 F.2d at 1419. In its decision, the Supreme Court held that

> evidence that is not "independent" of the contents of allegedly privileged communications—like the partial transcripts in this case—may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies.

Zolin, 109 S.Ct. at 2632 n. 12. We must therefore examine the transcripts and determine whether they, along with the independent evidence already reviewed, demonstrate sufficient evidence of intended illegality to establish that the tapes are within the crime-fraud exception. We hold that they do.

1 The Government has also attempted to present the declaration of Agent Philip Xanthos as evidence, but we have already denied the Government permission to present this declaration and will not consider it here. *See* March 3, 1987 Order.

The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning of future frauds against the IRS, in violation of 18 U.S.C. § 371. *See, e.g., United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984). The figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

We therefore reject the district court's holding that the Government did not make out a case of intended illegality. In light of the Supreme Court's holding that the tapes themselves can be examined for proof that would establish the crime-fraud exception, the transcripts can be examined, and they appear to make out the Government's case on intended illegality. On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time.[2]

REVERSED AND REMANDED.

2 The issue of the potential illegality of the transcripts, mentioned by the Supreme Court, *see Zolin*, 109 S.Ct. at 2624 n. 5, is not properly before this court. The Church did not raise this issue in its original appeal, and we will not consider it on a later remand. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1547-48 (9th Cir. 1988).

APPENDIX G

Order of United States Court of Appeals

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH
Filed July 5, 1988

UNITED STATES OF AMERICA,

Petitioner/Appellee/
Cross-Appellant,

v.

FRANK S. ZOLIN,

Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,

Intervenors/Appellants/
Cross-Appellees.

Before: BROWNING, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

ORDER

The opinion published at 842 F.2d 1135 is amended to include the following concurrence:

CONCURRENCE

NORRIS, Circuit Judge, concurring in the result:

I write separately to make it clear that I believe the independent evidence rule has been and should continue to be the law of the circuit. *See United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). However, I cannot join the court's order because the majority has failed to make clear whether the order is a disposition on the merits, *i.e.*, whether it constitutes en banc authority that the *Shewfelt* independent evidence rule is the law of the circuit. If the order is intended to be a disposition on the merits, it is internally inconsistent because an en banc panel cannot both decide a case on the merits and vacate as improvidently granted the order of the full court authorizing it to decide the case.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6065
85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

ORDER AND DISSENT

Order Filed March 28, 1988

Before: BROWNING, Chief Judge, ANDERSON, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

Dissent by Judge BEEZER

ORDER

En banc review was ordered in this matter under the mistaken assumption that *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972) and *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971) were in conflict on the question whether "the government must first establish a prima facie case of fraud independently of the said

[attorney-client] communications," *Shewfelt*, 455 F.2d at 840, before "the privileged status of these communications can be lifted." *Id.* There is no conflict. In *United States v. Friedman*, we did not discuss the showing that the government must make *before* the trial court can examine attorney-client communications to determine whether "the thrust of these . . . conversations was to effectuate a plan of fraud." *Shewfelt*, 455 F.2d at 840. In *Shewfelt* we did, and concluded that the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality. *Id.* *Shewfelt* is the law of the circuit.

The dictum in *United States v. King*, 536 F. Supp. 253 (C.D. Cal. 1982) suggesting that *Shewfelt* "does not now appear to be the law in the Ninth Circuit," *id.* at 262, is disapproved. That portion of the three-judge panel opinion in *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), beginning with the first full paragraph on page 1418 to and including the last full paragraph in the second column on the same page, is ordered withdrawn. The opinion of the three-judge panel will stand in all other respects.

The order dated November 6, 1987, that this matter be reheard en banc, is vacated as improvidently granted.

BEEZER, Circuit Judge, with whom ANDERSON and THOMPSON, Circuit Judges, join, dissenting:

The order that this matter be reheard en banc was not improvidently granted. I dissent.

According to Ninth Circuit Rule 35-1, our order to rehear the matter en banc was entirely appropriate.[1] The independent evidence requirement is a procedure for in-

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[1] Ninth Circuit Rule 35-1 states, "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals

voking the crime-fraud exception to the attorney-client privilege. We adopted this procedure, in a conclusory way, in *United States v. Shewfelt*, 455 F.2d 1076, 1080 (9th Cir. 1972). This procedure has not been endorsed by any other circuit court of appeals. The order filed today thus perpetuates a maverick version of the attorney-client privilege—a rule of national application. In addition, the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity. Considering that this circuit's position clashes with that of a majority of other circuits, our order that we rehear this matter en banc was most providently granted.

I

The crime-fraud exception defeats the attorney-client privilege. To invoke the exception, the government must make a prima facie showing that an otherwise privileged communication is in furtherance of fraud or crime. In this circuit the government has had to make the prima facie showing by the use of independent evidence—evidence other than the suspect communication itself. Elsewhere the government has been able to make the prima facie showing by the court's in camera inspection of the suspect communication. The substantive issue in this en banc case is: should we overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications? We should.

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and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc."

II

Every circuit to face the situation this case presents has allowed in camera inspection. In reverse chronological order, they are the Sixth, Second, D.C., Eighth, Third, and Fourth Circuits.[2] Following is a sample of the cases.

Sixth: *In Re Antitrust Grand Jury*, 805 F.2d 155, 168-169 (6th Cir. 1986).

Second: *In Re Grand Jury Subpoena Duces Tecum*, 798 F.2d 32 (2d Cir. 1986); *In Re John Doe Corp.*, 675 F.2d 482, 486 and 490 (2d Cir. 1982).

D.C.: *In Re Sealed Case*, 754 F.2d 395, 399-401 (D.C. Cir. 1985) (IRS case closely resembling case now before us); *In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982).

Eighth: *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 280 (8th Cir. 1984); *In Re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980); *In Re Murphy*, 560 F.2d 326, 331 and 338 n.23 (8th Cir. 1977); *Pfizer Inc. v. Lord*, 456 F.2d 545, 551 (8th Cir. 1972) (per curiam).

Third: *In Re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d. Cir. 1979).

Fourth: *Union Camp Corp. v. Lewis*, 385 F.2d 143, 144 (4th Cir. 1967).

III

Other circuits have not always addressed the underlying policy question in allowing in camera review for purposes of the crime-fraud exception. As an en banc panel

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[2] The Church of Scientology fails to distinguish these cases in any principled way. The Church does point out, correctly, that one of the D.C. cases only represents the views of one member of that court. *See In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982)(J. Skelly Wright).

establishing the law of this circuit, however, we are obligated to address the policy question.

In particular, we are charged with evaluating the tradeoff between maintaining confidentiality and prosecuting crimes. In addressing this policy question, the Second Circuit considered an additional factor, grand jury secrecy. Grand jury secrecy would rest on the scale alongside maintaining confidentiality, weighing *against* in camera inspection; still the Second Circuit found that the balance tipped in favor of in camera inspection. *In Re John Doe Corp.*, 675 F.2d at 490.

The need to prosecute crimes strongly supports in camera inspection. The attorney-client privilege was not designed to protect communications in furtherance of fraud or crime. When a communication, otherwise within the privilege, itself furthers fraud or crime, independent evidence of that fact rarely will be available. In such cases the independent evidence requirement would simply insulate dishonest parties from prosecution. *See United States v. King*, 536 F.Supp 253, 262 (C.D. Cal. 1982) (declining to follow *Shewfelt's* independent evidence requirement).

Church of Scientology suggests that in camera inspection would undermine several important policies. First, inspection would allow the crime-fraud exception to eviscerate the attorney-client privilege. According to the Church, the possibility of inspection could "chill open attorney-client discussions." The fact that the inspections take place in camera, however, mitigates any chilling effect. A judge is not a prosecutor and will not expose discussions that are unrelated to the fraud or crime alleged.

Second, according to the Church, inspection would force courts to review "any and all attorney-client communications upon the mere allegation by a party . . . that the crime-fraud exception applies." The fear of disclosure of even innocent communications would give prosecutors an unfair litigation advantage, and courts would incur the intolerable burden of reviewing file after file of communications.

In fact, the fear of disclosure of innocent communications would be reduced if the Ninth Circuit eliminated the independent evidence rule. In camera inspection would allow a district court more precisely to determine which communications further crime or fraud and which do not. *Compare In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986).

In any case, the predicate for the Church's conclusions is incorrect: in camera inspection need not force courts to review any and all documents alleged to fall within the crime-fraud exception. I would set out a rule that gives district courts discretion. Besides helping to prevent prosecutorial fishing expeditions, a rule affording discretion to district courts would allow those courts to regulate their burden of in camera review.

A district court, faced with an argument that the crime-fraud exception applies, would decide for itself whether a given case warrants in camera review. A district court would exercise its discretion to conduct in camera review according to the circumstances—including the presence or absence of circumstantial and other independent evidence. In a proper case, a district court might *reject* the crime-fraud exception without in camera review: without inspecting all documents alleged to evidence crime or fraud, or even without inspecting any documents—without hearing all conversations alleged to evidence crime or fraud, or even without hearing any conversations.

For additional protection of privileged documents—to avoid disclosure of innocent documents—I would also set out a rule that requires district courts to *allow* the crime-fraud exception only in relation to communications that the court individually has inspected in camera. This approach would be in line with the Sixth Circuit's position. In *In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986), the Sixth Circuit required the district court to review documents in camera before ordering them produced:

> Not only do we believe *in camera* review is mandated to determine the scope of the order, *in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made.

Church of Scientology hints that inspection would undermine another policy, that of supporting adversarial argument. In endorsing in camera review, the Second Circuit decided that limitations on adversarial argument are outweighed by the need to resolve an evidentiary question while preserving confidentiality. 675 F.2d at 490. In any case, the independent evidence rule itself does not support adversarial argument insofar as the subject of the argument—the communication alleged to be in furtherance of crime or fraud—is available to one party and not the other. At best a distorted form of adversarial argument can occur.

Finally, according to the Church, Federal Rule of Evidence 104(a) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), indicate that a court making preliminary inquiries about a privilege must abide by preexisting evidence rules such as the indpendent evidence requirement. Rule 104(a), however, is not on point. The rule deals with questions about the existence of a privilege, not about an exception to a privilege:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Church of Scientology gains no support for the independent evidence requirement by analogy to Rule 104(a). In the Ninth Circuit the rules of evidence with respect to privileges do allow for in camera review: a court undertakes in camera review of documents to decide whether the attorney-client privilege even exists with respect to those documents. *In Re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982).

Church of Scientology garners no support from *Bourjaily*. In that case the Supreme Court held that a showing to admit a co-conspirator's statement under Rule 801(d)(2) need not rely on independent evidence, but may rely on the statement itself. If anything *Bourjaily* suggests that a court may indeed examine suspect communications when considering the crime-fraud exception. *Compare* 107 S.Ct. at 2780.

Accordingly, I would overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications. The way I would formulate the rule, however, would dictate that we affirm the district court in this case.

IV

The government argues that the district court abused its discretion by rejecting the crime-fraud exception without inspecting all the tape recorded communications known to the government. According to the rule I have described, a

district court would be within its discretion to *reject* the exception without inspecting all suspect communications or even any communications. In this case the government submitted only a partial transcript of material to the district court. When the government submitted that partial transcript, the government was aware of the entire contents of the tapes. *See* Government's Brief at 12 (discussing Xanthos Declaration submitted to district court on motion for reconsideration). The district court was entitled to rely on the government to highlight, to the best of its ability, those parts of the tapes that might fall within the crime-fraud exception.

On appeal the government asks us to order the district court to inspect those parts of the tapes that were not within the partial transcript. In the district court, however, the government did not indicate that a partial transcript was an inadequate basis for a ruling on the crime-fraud exception. *See* Denial of Motion for Reconsideration, Government's Supplemental Excerpt of Record at Tab 80. The government never explained why it had failed to include the other parts of the tapes in the partial transcript in the first place. *Id.* The district court was well within its discretion to consider only the partial transcript, and the district court did not abuse its discretion in rejecting the crime-fraud exception.

V

We should overrule *Shewfelt* and eliminate the independent evidence requirement. An appropriate rule would make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure. In this case the district court did not abuse its discretion by rejecting the exception without a complete review.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

Nov. 6, 1987

Prior Report: 809 F.2d 1411.

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, KENNEDY, ANDERSON, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON O'SCANNLAIN, AND LEAVY, Circuit Judges.

ORDER

Upon the vote of a majority of the nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The previous three-judge panel assignment is withdrawn.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

OPINION

Argued and Submitted
November 6, 1986—Pasadena, California

Filed February 9, 1987

Before: JAMES R. BROWNING, Chief Judge, ALFRED T. GOODWIN AND JEROME FARRIS, Circuit Judges.

Opinion by Judge FARRIS

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

OPINION

FARRIS, Circuit Judge:

In July 1984, the Criminal Investigation Division of the IRS (Los Angeles District) began investigating L. Ron Hubbard's tax returns for the tax years 1979 through 1983. In October, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court and requested that he produce certain documents relating to Hubbard's potential tax liability. (The Superior Court had obtained the documents in connection with an unrelated proceeding brought by the Church against a former member of the Church.) The Clerk willingly produced a number of documents, but refused to produce thirteen documents which had been ordered sealed by the Superior Court.

In January 1985, the Government initiated this action in an effort to compel the Clerk to produce the thirteen sealed documents. Shortly thereafter, the district court granted the motions to intervene which were brought by the Church and Mary Sue Hubbard. The Intervenors contended that each of the thirteen documents was either privileged, irrelevant, or both. They also argued that the summons was unenforceable because it was not issued pursuant to a "good faith" tax investigation.

Hearings were held in March and April. On April 30, 1985, the district court ruled that eight of the documents—exhibits 4-D, 4-E, 4-F, 4-G, 5-C, 5-G, 5-I, and 6-B—were irrelevant, privileged, or both, and did not need to be produced. It ruled that five documents—exhibits 5-K, 5-L, 5-O, 5-P, and 6-O—should be produced, but prohibited the IRS from disclosing them to another governmental agency except in connection with a criminal tax prosecution or with the court's approval. The court

further ruled that the Intervenors had failed to prove that the summons was not issued in "good faith."

The Intervenors filed timely notice of appeal on July 1, 1985. The Government filed timely notice of cross-appeal on July 15, 1985. The order appealed from is a final order which disposes of all claims of all parties. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. *Mootness*

On January 24, 1986, during the pendency of this appeal, L. Ron Hubbard died. The Intervenors argue that because Hubbard's death has foreclosed the possibility of any further investigation of Hubbard's potential criminal tax liability, this proceeding has become moot. We reject the argument for the reason stated in *United States v. Author Services*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986).

B. *Relevance of Exhibits 5-O, 5-P, and 6-O*

The IRS' power to examine records in connection with tax investigations is broadly construed. *See Liberty Financial Services v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985); *De Masters v. Arend*, 313 F.2d 79, 87 (9th Cir. 1963). The relevance of such evidence depends on whether it might throw light on the correctness of a taxpayer's returns. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). The Government must demonstrate a "realistic expectation" of relevance, rather than an "idle hope" of relevance. *Id.* (quoting *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1969).

The Government bases its claims that the three exhibits are relevant on the declaration of Agent Petersell, in which Petersell stated:

> I have read the Petition to Enforce Internal Revenue Service Summons. Each of the items listed . . . is relevant to the investigation of L. Ron Hubbard in one or more of the following respects:
>
> A. Determining the extent to which income from the Church of Scientology inured to the benefit of L. Ron Hubbard.
>
> B. Determining whether L. Ron Hubbard conspired with others to impair and impede the Internal Revenue Service in the admiistration of the tax laws.
>
> C. Determining whether any violations of the Internal Revenue laws were done willfully with intent to evade tax.

The Government's other evidence of relevancy consists of three terse descriptions of the documents' contents in the petition for enforcement of the summons:

00000(5-0)	LRH note regarding the Mayor of Clearwater, Florida, 22 March 1978.
PPPPP (5-P)	LRH Statement regarding money from Scientology, 16 Feb. 1978.
000000(6-0)	LRH handwritten note regarding the Fair Game policy.

The record does not indicate the Government's sources for this information.

While the Government might have made a better showing, the district court did not clearly err in concluding that Petersell's declaration, when coupled with the general descriptions of the documents in the petition to enforce the summons, was sufficient to establish the relevance of the documents. We do not ignore our statement in *Goldman:*

> The Government's burden, while not great, is also not non-existent. The Government appears to argue that

the mere assertion of relevance by [an IRS agent] satisfied that burden. Even to the extent this might be true for records concerning the tax years being examined, relevance is not so clear when records for other years are sought.

Goldman, 637 F.2d at 667. Notwithstanding the fact that exhibits 5-O, 5-P, and 6-O all relate to years other than the tax years under investigation, we are satisfied that the district court, after balancing the indicia of relevancy against the impossibility of fully knowing the documents' contents before an actual review, did not clearly err in determining that the documents "might throw light" on the correctness of L. Ron Hubbard's return information.

C. *Waiver of Privilege As to Exhibits 5-K and 5-L*

The Intervenors do not contest on appeal the relevance of exhibits 5-K and 5-L. Instead, they contend that the district court erred in ruling that privileges which might otherwise have applied to the two documents were waived by a voluntary delivery of the documents to Gerald Armstrong. In addition, they argue that the district court erred when it concluded that exhibit 5-L would not be protected by the attorney-client privilege even in the absence of waiver because the affidavit of Hubbard's former attorney was too vague and conclusory to validly assert the privilege.

The attorney-client privilege is to be strictly construed *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). *See* 8 J. Wigmore, *Evidence* § 2291 at 554 (McNaughton rev. 1961). The logic behind the strict construction of the attorney-client privilege applies with equal force to the marital communications privilege: like the attorney-client privilege, the marital communications privilege is "an obstacle to the

investigation of the truth. . . . [that] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* The burden of demonstrating the existence of an evidentiary privilege rests on the party asserting the privilege. *See United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (attorney-client privilege); *Weil*, 647 F.2d at 25 (evidentiary privileges generally). In order to establish the applicability of the attorney-client privilege to a given communciation, the party asserting the privilege must affirmatively demonstrate non-waiver. *See id.; United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978).

The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege. *See Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985) (the voluntary disclosure of a privileged attorney-client communication constitutes waiver); *United States v. McCown*, 711 F.2d 1441, 1452-53 (9th Cir. 1983) (the marital communications privilege is inapplicable to communications not intended to remain confidential); *Weil*, 647 F.2d at 24 (the voluntary disclosure of a privileged attorney-client communication constitutes waiver). Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly voluntary delivery. *See In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege."). Whether the circumstances of the delivery of exhibits 5-K and 5-L to Armstrong gave rise to a waiver of the otherwise applicable privileges is a mixed question of law and fact that we review *de novo*. *See United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc).

The district court held that all privileges potentially applicable to exhibits 5-K and 5-L were waived by a voluntary delivery of the documents to Gerald Armstrong. We agree. The Intervenors argue that the delivery could not have been voluntary since the correspondence between Armstrong and Hubbard contains no express indication that Armstrong intended to, or had Hubbard's permission to, collect communications between Hubbard and his wife or between Hubbard and his attorneys.

Although Hubbard did not explicitly grant Armstrong access to attorney-client or marital communications, Hubbard did, in a memorandum to Armstrong, grant Armstrong general permission to collect documents relevant to the proposed biography of Hubbard. The Intervenors' only argument in support of non-waiver is that Hubbard did not specifically grant Armstrong access to attorney-client and marital communications. More is required.

Since the attorney-client privilege which might otherwise have attached to exhibit 5-L was waived, we need not consider whether the attorney-client privilege was validly asserted by Hubbard's former attorney.

D. *Limited Evidentiary Hearing*

We review for abuse of discretion. *See United States v. Stuckey*, 646 F.2d 1369, 1373 (9th Cir. 1981). *See generally Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (a district court's decisions relating to discovery matters are reviewed for abuse of discretion).

The purpose of the limited evidentiary hearing was to determine whether the summons enforcement proceeding was legitimate and in "good faith," rather than merely camouflage for an ulterior non-tax motive. The "good faith" standard seeks to prevent the IRS from becoming an information-gathering agency for other governmental

agencies. *See United States v. LaSalle National Bank*, 437 U.S. 298, 317 (1978); *Stuckey*, 646 F.2d at 1373. The task is to identify " 'those rare cases where bald allegations of harassment or improper purpose can be substantiated.' " *Author Services*, 804 F.2d at 1523 (quoting *United States v. Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975)). The focal issue is whether an IRS investigation is motivated by legitimate tax purposes. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). The district court may properly limit evidentiary hearings on the "good faith" issue to prevent a frustration of legitimate Government objectives. *Church of Scientology*, 520 F.2d at 823-25.

The Intervenors argue that the district court improperly limited its inquiry to the issue of whether the summons itself was issued in "good faith," and ignored and larger issue of whether the overall investigation was in "good faith." We reject the argument. At the hearing, C. Phillip Xanthos, the Branch Chief of the IRS Criminal Investigation Division (Los Angeles District), specifically testified as to the legitimate tax-determination objectives of the investigation. This and other testimony was sufficient to support the district court's finding that the summons was issued in "good faith." *See LaSalle National Bank*, 437 U.S. at 317. *See also Stuckey*, 646 F.2d at 1376; *United States v. Zack*, 521 F.2d 1366, 1368-69 (9th Cir. 1975).

E. *Restrictions on IRS Disclosure of the Summoned Documents*

The district court ordered that "the documents produced in response to the summons shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." We review the district court's order for abuse

of discretion. *See United States v. Columbia Broadcasting System,* 666 F.2d 364, 368 (9th Cir. 1982).

The Government argues that the district court's order conflicts with the disclosure provisions of 26 U.S.C. § 6103. Those provisions, the Government suggests, are the exclusive limitations upon IRS disclosure of return information. In addition, the Government argues that the order represents an improper attempt to enjoin the IRS from obeying a duly enacted federal law.

We recently rejected this argument in *Author Services,* and held that a district court's order restricting the IRS' ability to disclose summoned materials to other governmental agencies, "[r]ather than being an abuse of discretion, . . . [could] be a wise exercise of control." *Author Services,* 804 F.2d at 1526. The district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents. This is an appropriate exercise of the district court's discretion: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell,* 379 U.S. at 58. *See S.E.C. v. ESM Government Securities, Inc.,* 645 F.2d 310, 316-17 (5th Cir. 1981). A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions. *Author Services,* 804 F.2d at 1525 (citing *United States v. Texas Heart Institute,* 755 F.2d 469, 481 (5th Cir. 1985)).

The Intervenors also argue that the district court's order violates 26 U.S.C. § 7421(a) (the "Anti-Injunction Act"), because it has the effect of enjoining the IRS from disclosing the summoned tax information. We reject the argument for the reasons stated in *Author Services,* 804 F.2d at 1526.

F. *Exhibit 5-C ("the Tapes")*

The district court's rulings on the scope of the attorney-client privilege involve mixed questions of law and fact, and are reviewable *de novo. See McConney,* 728 F.2d at 1202. Where the relevant scope of the attorney-client privilege is clear and the decision that the district court must make is essentially factual, however, the district court's rulings as to the privilege are reviewed for clear error. *Id.* at 1200.

The Government contends that the district court erred in finding that the "common interest" rule covered the tapes. The "common interest" rule protects communications made when a nonparty sharing the client's interests is present at a confidential communication between attorney and client. The paradigm case is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys. *See Hunydee v. United States,* 355 F.2d 183, 185 (9th Cir. 1965).

The Government is incorrect, however, in arguing that the "common interest" rule is limited to such a case. Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications. *See Burlington Industries v. Exxon Corp.,* 65 F.R.D. 26, 44-45 (D. Md. 1974); *Stanley Works v. Haeger Potteries, Inc.,* 35 F.R.D. 551, 554-55 (N.D. Ill. 1964).

The district court found that the parties present at the meetings recorded on the tapes "had a common interest" in sorting out the respective affairs of the Church and Mr. Hubbard. We agree. All of the non-lawyers present at the meeting were employees of the Church.

The Government also challenges the district court's finding that the Church did not waive its attorney-client privilege when it inadvertently delivered the tapes to Armstrong. (Hubbard's personal secretary gave Armstrong the tapes under the mistaken impression that they were blank.) In *Transamerica Computer Co., Inc. v. International Business Machines, Corp.*, 573 F.2d 646 (9th Cir. 1978), we held that whereas a waiver of the attorney-client privilege occurs when a holder of the privilege voluntarily discloses the privileged matter, no waiver occurs if the holder has no opportunity to claim the privilege or if the holder was erroneously compelled to disclose the privileged matter. *Id.* at 651. The secretary's delivery of the tapes to Armstrong was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.

The Government challenges the district court's ruling that the "crime-fraud" exception to the attorney-client privilege did not apply to the tapes. The attorney-client privilege does not protect communications that further a crime or fraud. *See United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). The Government had the burden of making a prima facie showing that the attorney-client communications recorded on the tapes were in furtherance of an intended or present illegality. *Id.* We agree with the district court's conclusion that the Government failed to satisfy this burden.

The Intervenors argue that the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications recorded on the tapes. In support of this argument, they cite *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972). In *Shewfelt*, we said that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications." *Id.* at 840 (emphasis added). Notwithstanding *Shewfelt*, the Government argues that in assessing the applicability of the "crime-fraud" exception to the tapes the district court should have considered evidence of the contents of the tapes which the Government presented to the court.

Shewfelt's independent evidence requirement has been strongly criticized. In *In re Berkley and Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the Eighth Circuit observed that the two cases cited in *Shewfelt*, assertedly in support of the independent evidence requirement, in fact simply state that a party seeking disclosure under the "crime-fraud" exception must make a prima facie showing of crime or fraud in order to shift the burden of showing the inapplicability of the exception to the party resisting disclosure.

In the fourteen years that have passed since *Shewfelt* was decided, only one court has cited it as authority for the independent evidence requirement. *See Kockums Industries Limited v. Salem Equipment, Inc.*, 561 F. Supp. 168, 171 (D. Ore. 1983). By contrast, a number of courts have rejected the *Shewfelt* position. *See, e.g., In re Sealed Case*, 676 F.2d at 815; *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59 (7th Cir. 1980); *In re Berkley*, 629 F.2d at 553 n.9; *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201, 207 n.9 (D.D.C. 1985); *United States v. King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982).

In *Hodge and Zweig*, we discussed the "crime-fraud" exception at length without ever referring to *Shewfelt*. 548 F.2d at 1354-55. Instead, we cited repeatedly to *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), a decision which implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the "crime-fraud" exception. *Id.* at 1354.

In this case, the communications recorded on the tapes appear to be the Government's best evidence establishing the applicability of the "crime-fraud" exception. This is not surprising, since the illegal advice allegedly given by Church attorneys to Church officials is an integral part of the intended illegality that the Government seeks to establish. In this connection, the court's observation in *King* is pertinent: "[S]ince the illegal advice is usually given in the attorney-client setting, applying *Shewfelt* to such cases would, in most instances, simply serve to insulate dishonest attorneys from prosecution for obstruction of justice." *King*, 536 F. Supp. at 262.

In *King*, the court speculated that "the independence test set forth in *Shewfelt* does not appear to be the law in the Ninth Circuit." *Id.* We cannot agree. Whatever the merits of the criticisms that have been leveled against *Shewfelt*'s independent evidence requirement, we are bound to adhere to our holding in *Shewfelt* unless and until it is reversed by an *en banc* panel of this court. *See United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n.6 (9th Cir. 1985).

The Government's independent evidence of intended illegality consists primarily of: 1) Agent Petersell's Supplemental Declaration of March 8, 1985, in which Petersell stated that his discussions with Gerald Armstrong had given him reason to believe that the communications recorded on the tapes focused generally on the intentional violation of the tax laws; and 2) Petersell's Supplemental Declaration of March 15, 1985, in which Petersell stated that his discussions with three other former Church employees had given him reason to believe that the communications recorded on the tapes specifically focused on i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services

rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income derived from the "Trademark Trust" (a trust that was created to manage Hubbard's various Scientology-related and other trademarks) without that control being traceable to him.

We agree with the district court that this evidence, while not altogether insubstantial, is not sufficient to make out the requisite prima facie showing of intended illegality.

AFFIRMED.

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN

CIVIL MINUTES – GENERAL

Date June 10, 1985

PRESENT: Hon: HARRY L. HUPP, Judge

ATTORNEYS PRESENT FOR PLAINTIFFS:
Robert S. Horwitz, AUSA C. Magnusen

ATTORNEYS PRESENT FOR DEFENDANTS:
Gordon, Trask, Donald Randolph,
Michael Lee Hertzberg (for intervenors)

PROCEEDINGS: Plaintiff's Motion for Reconsideration

The motion for reconsideration of the court's order of April 30, 1985, is denied.

Plaintff complains that the court should have listened to the tapes in toto. While this was at one time discussed with counsel, thereafter Mr. Petersell's declaration was sub-

mitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question. Mr. Xanthos' declaration stands on a similiar footing; no reason is suggested as to why it could not have been submitted as a part of the materials considered in the April hearings.

Plaintiff also complains that the court should not have restricted the IRS from disclosing for other governmental purposes the contents of the documents ordered produced. Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court.

APPENDIX L

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK S. ZOLIN, CLERK OF THE SUPERIOR COURT, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

[Filed Apr. 10, 1985]

ORDER

The Court makes the following Orders and Findings:

1. Reconsideration is denied as to Exhibits 5G and 5I; the Order of March 12, 1985 will stand.

2. Intervenor Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding. Specifically, it is found that a bona fide criminal tax investigation of L. Ron Hubbard is being conducted by the IRS for the years 1979-83, that the matter has not been referred to the Department of Justice for prosecution, that the summons was validly issued pursuant to that investigation, that the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose. No further discovery on this issue is warranted.

3. With the exception of Exhibits 6B and 5C (the "MCCS tapes"), the Court finds that all potentially applicable privileges (attorney-client, marital) have been waived by voluntary delivery of the material to Gerald Armstrong. In addition, no privilege has been validly asserted by the holder of a potential privilege as to certain items (Exhibits 5L and 5P).

4. Sufficient relevancy being shown, the IRS is entitled to inspect and copy Exhibits 5K, 5L, 5O, 5P and 60, and the summons is to be enforced as to those items.

5. No relevancy or waiver has been shown for Exhibit 6B, and it need not be produced.

6. As to Exhibit 5C (the "MCCS tapes"), the Court finds:

(a) The tapes consist of confidential communications between attorneys and clients or clients' authorized agents.

(b) The confidential communications were between clients and their attorneys who had a common interest; the privilege was, therefore, not destroyed by publication of the communication to an outsider.

(c) There was no waiver of the privilege by delivery to an outsider, the Court finding that the tapes were delivered to Gerald Armstrong by mistake, and, in addition, that Petitioner has not carried the burden of showing waiver.

(d) The "fraud-crime" exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned.

(e) The Order sealing the Petersell affidavit (filed March 15, 1985) quoting excerpts from the tapes will remain sealed.

(f) This Court's copy of the tapes will remain sealed in possession of the Court's Clerk until after any appellate

review of this Order, after which it is to be returned to the Superior Court. The Clerk of the Superior Court need not produce its copy of the tapes pursuant to the summons.

7. The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained.

Petitioner is to prepare an Order in accord with this Order and the Order of March 12, 1985. This Order is stayed for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered.

IT IS SO ORDERED.

DATED: April 30, 1985.

/s/ HARRY L. HUPP
HARRY L. HUPP
United States District Judge

APPENDIX M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 84-9003-HLH

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
a California corporation,
Plaintiff,

v.

GERALD ARMSTRONG, et al.,
Defendants.

MARY SUE HUBBARD,
Intervenor.

Date January 22, 1985

ORDER

IT IS ORDERED that all documents remaining in the possession of the Clerk be delivered forthwith to the Clerk of the Superior Court of Los Angeles County. This is a final Order terminating this proceeding. The various motions are determined accordingly. The effect of this Order is stayed for ten (10) days.

This whole dispute was caused by a mistake. The Court proposes to remedy it by putting the matter back in *status quo ante*, and let the parties resume their apparently never-ending litigation at the point where they would have been

except for the mistake. That is the plain and simple reason for the above Order.

What happened (meaning: "findings of fact") was that the Superior Court had impounded and sealed a group of documents of the Church pending litigation between the Church and Armstrong over possession of them. On deciding the portion of the case dealing with document possession, the trial judge "unsealed" the portion of the documents admitted into evidence or marked for identification, leaving "sealed" the balance pending finality of the judgment. A flurry of stay and "un-stay" orders followed in every conceivable court. During this period, the IRS served a summons on the Superior Court for delivery of the documents, which the Superior Court then declined to follow. Within a period between an "un-stay" and another stay, during the temporary absence of the Superior Court trial judge, the then Presiding Judge of the Superior Court signed an order allowing the IRS access to all of the documents under the mistaken impression that he was carrying out the order of the trial judge. The Presiding Judge promptly cancelled his order on being advised of the error, but in the meantime the IRS had obtained copies of documents and tapes in both the sealed and unsealed category. The Church caused a Superior Court subpoena to be served on the IRS for return of the copied items, and the IRS promptly removed the subpoena (but not the balance of the Superior Court action) here. This Court ordered the IRS to deposit the copied items with the Clerk until the welter of stay and "un-stay" orders resolved itself, which it did, "un-stay" being the final word.

Accordingly, the Court ordered the documents which were unsealed by the Superior Court order delivered to the IRS and now must figure out what to do with the sealed documents and tapes. The answer seems easy; they ought to go back to where they should have been in the first place, and that is the Court's Order. The IRS can start its summons enforcement proceedings and the question of whether an IRS summons beats a Superior Court sealing order can be tested.

If authority be needed for the above conclusions (this is the conclusion of law), the closest case in point (*Linn* v. *Chiva-*

tero (5th Cir. 1983) 714 F.2d 1278) holds that the District Court may make an order putting things back to the *status quo ante* when the IRS gets documents through a mistake.

This document is the final Order in this matter and is intended to dispose of it.

DATED: January 22, 1985.

/s/ HARRY L. HUPP
United States District Judge